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Uncomfortable with Public Displays of Religion? Then Avoid Them!

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Declaring some level of confrontation and cooperation between church and state as “almost inevitable in our modern polity,” legal historian John Witte, Jr. today called for individuals to avoid the “public expressions of religion that they cannot abide.”

“Just turn off Pat Robertson and Jerry Falwell. Close your eyes to the city crucifix that offends. Cover your ears to the public prayer that you can’t abide. Walk by the town hall’s menorah and star,” said Witte, Jonas Robitscher Professor of Law and Ethics, director of the Center for the Study of Law and Religion (CSLR) and director of the Law and Religion program at Emory University. He addressed the issue of separation of church and state to a full house at Emory Law School’s Tull Auditorium.

Witte says avoiding public displays of religion is far preferable than taking the issue to court. “Such voluntary self-protections from religion will ultimately provide far greater religious freedom for all than pressing yet another tried and tired constitutional case.”

His lecture, titled “Facts and Fictions of Separation of Church and State: There is No Wall,” offered an historical overview of the American founders’ writings and Supreme Court decisions that have shaped the definition of separation of church and state.

First, Witte outlined five distinct understandings of church-state separation taught by the American founders that made important contributions to the protection of religious liberty in the 19th century and still apply today. Witte says the principle of separation was invoked by the founders to protect:

1. the church from the state
2. the state from the church
3. the individual’s liberty of conscience from the intrusions of both church and state
4. individual states from interference by the federal government in governing local religious affairs
5. society from unwelcome participation in and support for religion

Witte explained that the fifth element was the most controversial understanding of the principle of separation of church and state in the young American republic and was the catalyst for a century-long battle over the “meaning and means” of separating church and state. The battle, which started in the year 1800 between Thomas Jefferson’s Republican party and John Adams’ Federalist party, made “the recent Bush-Kerry campaign look like child’s play.”

“ Adams ’ party accused Jefferson of being the anti-Christ and whore of Babylon , a Jacobin infidel and secularist bent on destruction of the necessary religious foundations of law and necessary alliances of church and state. Jefferson ’s party accused Adams of being a Puritan pope and religious tyrant bent on subjecting the whole nation to his suffocatingly narrow beliefs and to his smug, self-serving ministers who stood foursquare against liberty and progress,” said Witte.

Several Supreme Court and state court decisions during this time ultimately invoked the separation clause as a means to protect religion from state interference.

Then, in the 1947 Supreme Court case of *Everson v. Board of Education*, the Court strengthened the meaning of separation by applying the First Amendment establishment clause to the states by rendering it in effect to say: “Governments of any kind shall make no law respecting an establishment of religion.” It also read into the establishment clause a strict separationist logic. Wrote Justice Black:

“Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state.’”

Witte infers that Justice Black’s interpretation of Thomas Jefferson’s wall of separation between church and state, appearing in Jefferson’s famous 1802 letter to the Danbury Baptist Association while he served as U.S. President, was overstated and for the next several decades was too severely implemented. The passage reads:

“Believing with you that religion is a matter which lies solely between a man and his God, that he owes account to none other for his faith or his worship, that the [legitimate] powers of government reach actions only, and not opinions, I contemplate with sovereign reverence the act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibit the free exercise thereof,’ thus building a wall of separation between church and State...”

Says Witte, “Indeed in the very next paragraph of his letter, President Jefferson performs an avowedly religious act of offering prayers on behalf of his Baptist correspondents by writing: ‘I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man.’”

The Supreme Court applied *Everson’s* strict separationist logic primarily in cases challenging traditional state patronage of religious education, said Witte. Then, in the 1971 case *Lemon v. Kurtzman*, the Court “distilled the separationist logic of its early cases into a general test to be used in all establishment clauses cases.”

“The Lemon test rendered the establishment clause a formidable obstacle to many traditional forms and forums of church-state cooperation,” said Witte, pointing out that lower courts used it to outlaw government subsidies for religious charities, social services and mission works, as well as government use of religious services, facilities, publications and more.

Witte reminded the audience that the establishment clause is just one of two clauses regarding religion in the First Amendment that hold guarantees of religious freedom, and they are complementary. The First Amendment reads: “Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof.”

“The free exercise clause outlaws government *proscriptions* of religion – actions that unduly burden the conscience, restrict religious expression, discriminate against religion, or invade the autonomy of churches and other religious bodies; the establishment clause outlaws government *prescriptions* of religion – actions that coerce the conscience, mandate forms of religious expression, discriminate in favor of religion, or improperly ally the state with churches of other religious bodies,” he said.

“Read together this way, the free exercise and establishment clauses afford reciprocal and complementary protections to liberty of conscience, freedom of religious expression, religious equality, and separation of church and state,” he added.

Witte looked to James Madison for a solution to the issues of today. “James Madison...warned in 1833 that ‘it may not be easy, in every possible case, to trace the line of separation between the rights of Religion and the Civil authority, with such distinctness, as to avoid collisions and doubts on *unessential* points.’

“For better or worse,” Witte continued, “the modern American welfare and security state reaches very deeply into virtually all aspects of modern life through its vast network of education, charity, welfare, child care, health care, construction, zoning, workplace, taxation, immigration and sundry other regulations. Therefore, it is even more imperative today that the principle of separation of church and state not be pressed to reach the ‘unessentials.’ Government must strike a balance between coercion and freedom.”

For example, Witte says, “it is one thing to outlaw Christian prayers and broadcasted Bible readings from the public school; after all, students are compelled to be there. It is quite another thing to ban moments of silence and private religious speech in these same public schools.”

He adds, “In the constitutional schemes of 19th century America, it was not so much the courts as the frontier that provided religious freedom – a place away from it all, where one could escape with one’s conscience and co-religionists. Today, the frontier still provides this freedom – if not physically in small towns and wild mountains, then virtually in our ability to sift out and shut out the public voices of religion that we do not wish to hear.”

The lecture was hosted by the CSLR and served as the first McDonald Lecture, made possible by a \$500,000 grant from the Alonzo L. McDonald Family Agape Foundation for a new five-year project on Christian jurisprudence. Alonzo L. McDonald is Trustee Emeritus of Emory University. The project is tasked to create a series of new publications and public forums on fundamental issues at the intersection of law, religion and society.

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